NO. 22058

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENNIS C. DEYO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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STATEMENT OF JURISDICTION

This is a timely [1/] appeal from a judgment of conviction after trial without a jury for violation of the Drug Abuse Control Amendments of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 331(q)(2) and (3) and 21 U.S.C. 333(a).

Pursuant to 18 U.S.C. 3231, the District Court had jurisdiction to try this case.

1/ The Criminal Information charges the defendant with violation of 21 U.S.C. 331(q)(2) and (3) and 21 U.S.C. 333(a). (V. 1, pp. 2-4). On May 18, 1967, the trial Court announced its oral judgment of conviction. (V. 2, p. 15). On June 20, 1967, a written judgment was filed. (V. 1, p. 36). On June 21, 1967, appellant Deyo filed a notice of appeal. (V. 1, p. 38).

Under 28 U.S.C. 1291 and 1294, this Court has jurisdiction to review the judgment of the District Court.

STATEMENT OF THE CASE

The four-count Information charged appellant Deyo and his codefendant, Millet, with the sale, delivery, and possession of the hallucinogenic drug LSD in violation of the Federal Food, Drug, and Cosmetic Act, as amended (V. 1, pp. 2-5). Deyo is specifically charged with two counts of sale and delivery (V. 1, pp. 2 and 4) and one count of possession (V. 1, p. 3).

Deyo [2/] waived trial by jury (V. 1, p. 9) and was tried by the Court on May 18, 1967, on the following stipulated facts (V. 1, pp. 28-29):

1. On December 1, 1966, Rex D. Millet and Dennis C. Deyo, defendants in the above-entitled case, met in Palm Springs, California, in Riverside County, within the Central District of California, with Jay H. Park, an employee of the Federal Food and Drug Administration, Bureau of Drug Abuse Control, acting as an undercover agent.

2. That at that time, defendant Millet, in the presence of defendant Deyo, told Agent Park that they would sell him 30 capsules of LSD for $80.

2/ Defendant Millet was tried separately and convicted on all counts in which he was charged (V. 1, pp. 27 and 34). Millet did not appeal.

3. That defendant Deyo then handed Agent Park a box which subsequent chemical analysis determined to contain, and which defendant Deyo knew to contain, 30 capsules of LSD, and for which Agent Park handed $80 to defendant Deyo.

4. On December 2, 1966, Agent Park again met with defendants Millet and Deyo at the Vista Del Sol Motel in Palm Springs, within Riverside County in the Central District of California.

5. At that time, in the presence of Agent Park and defendant Deyo, defendant Millet spread some capsules out on a bed, after Agent Park asked him whether they had brought the 70 capsules of LSD.

6. Agent Park counted out 70 capsules, and then handed $170.00 to defendant Deyo.

7. Defendant Deyo then handed part of the purchase money to defendant Millet.

8. These 70 capsules contained, and defendant Deyo knew them to contain, LSD.

9. Said LSD sold on both above dates is a "depressant or stimulant drug" within the meaning of 21 U.S.C. 321(v)(3) and 31 F.R. 4679.

No additional evidence was offered at the trial (V. 2, pp. 7-8). Counsel for Deyo then argued that the statute under which this case arose was unconstitutional (V. 2, pp. 8-15). The District Court ruled that the statute is within the power of Congress and found Deyo guilty as charged in Counts One, Two, and Three (V. 2,

pp. 15-16).

On June 20, 1967, the Court sentenced Deyo to imprisonment for a period of nine months on each count, to run concurrently, on condition that Deyo serve 45 days, with the remainder of the sentence suspended for a three-year probationary period on certain specified conditions (V. 1, p. 36).

On June 21, 1967, Deyo filed a Notice of Appeal (V. 1, p. 38). On July 3, 1967, the District Court set bail for Deyo pending appeal in the amount of $2500 and granted Deyo's motion to appeal in forma pauperis (V. 1, p. 45).

RELEVANT STATUTES AND REGULATIONS

21 U. S. C. 333 Penalties - Violation of Section 331 of this title

(a) Any person who violates any of the provisions of Section 331 of this title shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine ...

21 U. S. C. 331 Prohibited acts

The following acts and the causing thereof are hereby prohibited:

* * *

(q) ... (2) the sale, delivery, or other disposition of a drug in violation of Section 360a(b) of this

title; (3) the possession of a drug in violation of Section 360a(c) of this title; . . . .

21 U.S.C. 360a Depressant and stimulant drugs . . .

* * *

Sale, delivery, and disposal; persons exempt from prohibition

(b) No person . . . shall sell, deliver, or otherwise dispose of any depressant or stimulant drug to any other person.

Possession restriction; burden of proof in criminal prosecutions

(c) No person . . . shall possess any depressant or stimulant drug otherwise than (1) for the personal use of himself or of a member of his household, or (2) for administration to an animal owned by him or a member of his household. In any criminal prosecution for possession of a depressant or stimulant drug in violation of this subsection (which is made a prohibited act by Section 331(q)(3) of this title), the United States shall have the burden of proof that the possession involved does not come within the exceptions contained in clauses (1) and (2) of the preceding sentence.

21 U.S.C. 321 Definitions; generally

For the purposes of this chapter --

* * *

(v) The term "depressant or stimulant drug" means --

* * *

(3) Any drug which contains any quantity of a substance which the Secretary, after investigation, has found to have, and by regulation designates as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect; ....

REGULATIONS

21 C.F.R. 166.3 Listing of drugs defined in Section 201(v) of the Act [21 U.S.C 321(v) I:

* * *

(c) The Commissioner has investigated and designates all drugs, unless exempted by regulations in this part, containing any amount of the following substances as having a potential for abuse because of their:

* * *

(3) Hallucinogenic effect:

Established name	Some trade and other names

* * *

LSD-25; LSD ..... d-Lysergic acid diethyl-amide.

ARGUMENT

A. THE FEDERAL FOOD, DRUG, AND COSMETIC ACT HAS BEEN REVISED FREQUENTLY TO ENHANCE ITS EFFECTIVENESS AS AN INSTRUMENT OF PUBLIC PROTECTION.

The Federal Food, Drug, and Cosmetic Act was enacted in 1938 as a comprehensive statute to safeguard the public from food, drugs, devices, and cosmetics that are adulterated, misbranded, or otherwise pose a threat to the consumer. United States v. Dotterweich, 320 U.S. 277, 280 (1943); United States v. Sullivan, 332 U.S. 689, 696 (1948); United States v. Walsh, 331 U.S. 432, 437 (1947); United States v. El-O-Pathic Pharmacy, 192 F.2d 62, 74-75 (C.A. 9, 1951); Drown v. United States, 198 F.2d 999, 1004 (C.A. 9, 1952), cert. denied 344 U.S. 920; Golden Grain Macaroni Co. v. United States, 209 F.2d 166, 168 (C.A. 9, 1953).

Since 1938, Congress has enacted a number of amendments to this law, fashioned to cope with special problems as they have arisen and become acute beyond the effective reach of the basic statute. Some examples of problems requiring amendatory legislation are excessive residues of pesticide chemicals on foods, United States v. Bodine Produce Co., Inc., 206 F. Supp. 201, 206-207 (D. Arizona, 1962), and the premature marketing of "new drugs" without adequate testing for safety and effectiveness, Turkel v.

Food and Drug Administration, 334 F. 2d 844, 845 (C. A. 6, 1964), cert. denied 379 U. S. 990. The amendments devised new types of controls as needed to deal with the problem at hand.

The present case arose under the Drug Abuse Control Amendments of 1965 (79 Stat. 226-236). These amendments are concerned with a limited class of drugs as defined in 21 U. S. C. 321(v), namely, drugs which (1) are dangerous and lend themselves to widespread and serious misuse throughout the nation, (2) flow freely through, pollute, and otherwise affect, the channels of interstate commerce, and (3) are distributed surreptitiously without labels or other characteristics that would identify their manufacturing source so that there is a commingling of drugs of interstate and intrastate origin, thereby frustrating the Congessional purpose to regulate interstate traffic in such drugs.

A prior amendment enacted in 1951 (68 Stat. 648 ff) to deal with dangerous drugs had focused primarily upon unsavory dispensing practices of some pharmacists, United States v. Carlisle, 234 F. 2d 196 (C. A. 5, 1956), cert. denied 352 U. S. 841, but had shown itself to be cumbersome and unwieldy in the face of widespread clandestine distribution of tremendous quantities of dangerous drugs outside the drugstore. De Freese v. United States, 270 F. 2d 730, 731-2, 735-8 (C. A. 5, 1959), cert. denied 362 U. S. 944; Roseman and Copley v. United States, 364 F. 2d 18, 20-24 (C. A. 9, 1966), cert. denied 386 U. S. 918.

The Roseman and Copley case, supra, decided by this Court last year, arose under the pre-existing statute and illustrates well

some of the compelling reasons for enactment of the Drug Abuse Control Amendments. The drug in question was LSD as in the present case. It was sold in liquid form and as the Court observed at page 21:

> "When it was delivered to Pilson it did not have any label on it nor any warnings as to use, any common name, any statement of the ingredients or composition, nor any of the other markings required by the Federal Food, Drug, and Cosmetic Act. . . ."

In fact, as pointed out by the Court on page 20, there was no dispute that the defendants had sold LSD which would be in violation of the statute if it could be shown that the drug had been introduced into interstate channels.

The principal defense in Roseman was that the LSD was made in California and had never left the state. The protracted trial revolved largely around this one issue. Defendants were convicted and the conviction sustained because evidence was adduced showing that the defendants had made their way through California to Canada and back to California with concentrated LSD in their possession, offering it for sale as they went up and down the coast, and organizing an LSD party in Canada where one participant was injured. This evidence was sufficient to meet the requirements of interstate commerce under the basic statute (page 20). After conducting the prolonged trial in Roseman and observing the great expense and difficulty entailed in establishing movement of an unlabeled dangerous drug in interstate commerce, Chief Judge

Harris felt obliged to state: [3]

> " . . . I think there is a very grave responsibility upon the part of the Food and Drug authorities to make appropriate recommendations to such congressional committees as may be involved with respect to appropriate legislation in connection with this type of drug as in connection with kindred types of drugs."

Unquestionably, Judge Harris was concerned about the inadequacy of the basic statute to control effectively the growing menace of LSD and similar dangerous drugs. On January 27, 1965, the Commissioner of Food and Drugs transmitted the views of Judge Harris to a Congressional committee that was deeply immersed in this problem (Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 89th Cong., 1st Sess. on H. R. 2), stating in part on page 23:

> "In sentencing the defendants, Judge Harris remarked that the Food and Drug authorities should recommend legislation appropriate to deal with these types of drugs to interested congressional committees."

Six months later, the Drug Abuse Control Amendments were enacted.

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[3] (C. A. 9, No. 19636, V. 9, pp. 1100-1101). We believe the Court may take judicial notice of its own records in another case. See United States v. Pink, 315 U. S. 203, 216 (1942); National Fire Insurance Co. v. Thompson, 281 U. S. 331, 336 (1930); Wiley v. United States, 144 F. 2d 707, 708 (C. A. 9, 1944).

B. THE PATTERN AND SCOPE OF THE DRUG ABUSE CONTROL AMENDMENTS OF 1965.

For a decade and a half, 1950-1965, Congressional committees inquired into the expanding nationwide problem of drug abuse and the inadequacy of the then existing laws to control it. The Drug Abuse Control Amendments of 1965 are the end result of that study. Some of the Congressional findings are summarized in Senate Report No. 337 published in United States Code Congressional and Administrative News, 1965, pages 1895-1909. For example, at page 1896 the Report states:

> "At the hearings last year, testimony showed that over nine billion barbiturate and amphetamine tablets are produced annually in the United States. It is estimated that over 50 percent, or 4 1/2 billion tablets, are distributed through illicit channels.
>
> "The human toll of drug abuse cannot be measured for it affects not only the abuser but his family and the community around him. Drug abuse is closely bound up with juvenile delinquency. It also contributes to the rising crime rate in the United States. Misuse of these drugs has contributed to the rising accidents on the highways.
>
> "The illegal traffic in drugs is enormously profitable. Barbiturates and amphetamines having a retail value of approximately $670 sell in illicit

channels for in excess of $250,000."

Specifically with respect to LSD, the Report states at page 1898:

> "Hallucinogens are drugs which affect the central nervous system in such a fashion as to cause the user to have a distorted sense of reality. The most prominent of the hallucinogenic drugs being abused today is d-lysergic acid diethylamide, more commonly referred to as LSD-25. This drug is sometimes used as an adjunct to psychotherapy and as a research tool in psychiatry. Its use by amateurs and drug abusers can cause some terrifying experiences for the victims. It is capable of producing prolonged psychiatric reactions in persons possessing a previous underlying personality problem, and can precipitate the acting out of anti-social-behavior patterns."

On page 1896, the Report declares the purpose of this legislation:

> "The bill provides increased controls over the distribution of barbiturates, amphetamines, and other drugs having a similar effect on the central nervous system. The controls are accomplished through increased recordkeeping and inspection requirements, through providing for control over intrastate traffic in these drugs because of its effect on interstate traffic, and through making possession

of these drugs (other than by the user) illegal outside of the legitimate channels of commerce."

The term "depressant or stimulant drug" is defined to include amphetamines and barbiturates, and, through implementing regulations, such drugs as LSD. [21 U.S.C. 321(v)(1) - (3); 21 C.F.R. 166.3(c)(3)]. The sale, delivery, and possession of these drugs (other than for personal use) is prohibited. [21 U.S.C. 360a(b) and (c); 21 U.S.C. 331(q)(2) and (3)]. Exceptions are made where the drugs are legitimate articles of commerce or research 4/ and are confined to the legitimate chain of distribution. [21 U.S.C. 360a(b) - (c)].

As the result of its extensive investigations into the drug abuse problem, Congress concluded that, to regulate interstate traffic in these drugs, it was essential to control closely related intrastate activities. The reasons for this conclusion are set forth in Congressional Findings and Declaration of Policy which appear as Section 2 of the Amendments, Public Law 89-74, 79 Stat. 226.

4/ LSD is a "new drug" which may not be distributed commercially until a New Drug Application establishing its safety and effectiveness has been approved by the Food and Drug Administration. [21 U.S.C. 355(a); 21 U.S.C. 360a(b)]. There is no approved NDA for LSD. See Roseman and Copley v. United States, 364 F.2d 18, 20 and 24 (C.A. 9, 1966), cert. denied 386 U.S. 918. A "new drug" for which there is no approved NDA may be distributed for investigational use under strict controls. [21 U.S.C. 355(i); 21 C.F.R. 130.3]. Especially tight controls have been established to govern any research in LSD, requiring advance approval of the Commissioner of Food and Drugs because of the great hazards involved. [21 C.F.R. 3.47; see also preamble to this regulation in 31 F.R. 9540].

These Findings and Declaration are also quoted in 21 U. S. C. A. in the Notes following Section 360a, page 121 of the 1966 Cumulative Annual Pocket Part:

> "The Congress hereby finds and declares that there is a widespread illicit traffic in depressant and simulant drugs moving in or otherwise affecting interstate commerce; that the use of such drugs, when not under the supervision of a licensed practitioner, often endangers safety on the highways (without distinction of interstate and intrastate traffic thereon) and otherwise has become a threat to the public health and safety, making additional regulation of such drugs necessary regardless of the intrastate or interstate origin of such drugs; that in order to make regulation and protection of interstate commerce in such drugs effective, regulation of intrastate commerce is also necessary because, among other things, such drugs, when held for illicit sale, often do not bear labeling showing their place of origin and because in the form in which they are so held or in which they are consumed a determination of their place of origin is often extremely difficult or impossible; and that regulation of interstate commerce without the regulation of intrastate commerce in such drugs, as provided in this Act, would discriminate against and adversely affect interstate commerce in such drugs."

As enacted, the Drug Abuse Control Amendments do not require the Government to prove that the "depressant or stimulant drug" involved in a particular forbidden transaction [5/] had previously been transported from another State or a foreign country. This is the basis for appellant's argument that the statute as amended is unconstitutional.

C. THE DRUG ABUSE CONTROL AMENDMENTS ARE CLEARLY WITHIN THE CONSTITUTIONAL POWER OF CONGRESS TO REGULATE INTERSTATE COMMERCE.

Appellant attacks the constitutionality of important amendments to the Federal Food, Drug, and Cosmetic Act, without citing the long line of Supreme Court cases that have a direct bearing on this issue. These cases sustain the power of Congress to regulate local activities which substantially affect its plenary control over interstate commerce:

Heart of Atlanta Motel, Inc. v. United States,
379 U.S. 241, 251-258 (1964);

Katzenbach v. McClung,
379 U.S. 294, 299-304 (1964);

Wickard v. Filburn,
317 U.S. 111, 118-128 (1942);

5/ Such drug is subject to seizure and condemnation. [21 U.S.C. 334(a)(2)]. Persons responsible for the doing of prohibited acts with respect to such drug are subject to injunction and criminal action. [21 U.S.C. 331(q), 332(a), and 333(a)].

Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 772 (1947);

United States v. Haley, 358 U.S. 644 (1958), reversing 166 F. Supp. 336;

United States v. Wrightwood Dairy Co., 315 U.S. 110, 119-121 (1942);

United States v. Darby, 312 U.S. 100, 119-121 (1941);

United States v. New York Central Railroad Co., 272 U.S. 457, 464 (1926);

NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963).

Thus in United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942), the Court upheld the validity of a Federal regulation controlling the price of milk produced and sold intrastate. On page 119, the Court stated:

> "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. ... The power of Congress over interstate commerce is plenary and

complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."

See also Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 772 (1947).

In Wickard v. Filburn, 317 U.S. 111 (1942), the Court considered the constitutionality of the Agricultural Adjustment Act under the Commerce Clause where the statute "extend[ed] federal regulation to production not intended in any part for commerce but wholly for consumption on the farm" (page 118). In its review of the significant cases up to that time, delineating the "great latitude" of the commerce power (page 120), the Court included a quotation from an opinion of Mr. Justice Holmes (page 122):

" . . . 'commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.' " 6/

6/ In a later case defining the broad reach of the control of false labeling under the Federal Food, Drug, and Cosmetic Act, the Court again relied upon this concept:

"The Act is not concerned with the purification of the stream of commerce in the abstract. The problem is

(continued)

After declaring that "the effects of many kinds of intrastate activity upon interstate commerce were such as to make them a proper subject of federal regulation" (page 122), and citing a number of examples, the Court sustained the validity of the statute in these words (pages 128-9):

> " . . . Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."

In United States v. Darby, 312 U.S. 100 (1941), the Court referred to a line of cases upholding the Congressional power where local and interstate activities are interwoven and difficult to identify and separate. On page 121, the Court said:

> "A familiar . . . exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. . . . Similarly Congress may require inspection and preventive treatment of all cattle in a disease infected area in order to prevent shipment in interstate commerce of some of the

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6/ (continued) a practical one of consumer protection, not dialectics."

United States v. Urbuteit, 355 U.S. 355, 357-8 (1948).

cattle without the treatment. Thornton v. U.S., 271 U.S. 414."

These observations are particularly appropriate with respect to drugs dealt with by the Drug Abuse Control Amendments, since they command high profits in illicit channels and move throughout the nation with great mobility but without a label stating where they were made, so that interstate and intrastate dealings in these drugs are inseparably intertwined. See also United States v. New York Central Railroad Co., 272 U.S. 457, 464 (1926).

Nor is it relevant whether a particular local transaction is large or small. In NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224 (1963), the Court observed at page 226:

"Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce."

See also Wickard v. Filburn, 317 U.S. 111, 127-128 (1942).

Finally, in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), where the Court upheld Title II of the Civil Rights Act of 1964, it stated at page 258:

"It is said that the operation of the motel here is of a purely local character. But, assuming

this to be true, 'if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' . . ."

This is, of course, a landmark case in defining the breadth of the power of Congress to regulate and protect its regulation of interstate commerce.

The principles enunciated in the cases cited above have been applied to sustain the constitutionality of other provisions of the Federal Food, Drug, and Cosmetic Act which regulate intrastate activities. Thus, it is within the constitutional power of Congress under the "Commerce Clause" to prohibit the giving of a false guaranty of assurance (to a person engaged wholly or partly in an interstate business) that a vitamin product is not adulterated or misbranded within the meaning of the Act, regardless of whether that guaranty leads in any particular instance to an illegal shipment in interstate commerce. United States v. Walsh, 331 U.S. 432, 437-438 (1947).

Congress may also regulate the dispensing practices of a retail druggist in a purely intrastate transaction with respect to a drug that had previously been shipped in interstate commerce. United States v. Sullivan, 332 U.S. 689, 691-2 696-8 (1948).

Similarly, Congress may prohibit the holding of food (after interstate shipment and before ultimate sale) under insanitary conditions whereby it may become contaminated with filth. United States v. Wiesenfeld Warehouse Co., 376 U.S. 86, 91-2 (1964).

Congress may further prohibit the intrastate sale and

delivery of a misbranded device where the seller knows that the buyer intends to take the device to another State. Drown v. United States, 198 F. 2d 999, 1004 (C. A. 9, 1952), cert. denied 344 U. S. 920.

In each of these cases, it was clear there was a rational basis to conclude that regulation of the particular intrastate activity was essential to prevent obstruction or thwarting or nullification of the Congressional exercise of its constitutional power over interstate commerce. In like manner, the Drug Abuse Control Amendments regulate "intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power". United States v. Wrightwood Dairy Co., 315 U. S. 110, 119 (1942).

Through more conventional legislation, Congress has sought to control interstate traffic (1) in "dangerous drugs" [21 U. S. C. 353(b)(1)] that are suitable for bona fide prescription sale, and (2) in unproven "new drugs" [21 U. S. C. 355 and 321(p)] which include certain of the dangerous drugs such as LSD that are not suitable for prescription sale. Such legislation is ineffective to deal with the vast quantities of "depressant and stimulant" drugs [21 U. S. C. 321(v)] that move through the channels of interstate commerce because they carry no indicia of interstate origin so that it is "often extremely difficult or impossible" to establish the element of interstate commerce. [Congressional Findings and Declaration of Policy, quoted supra in Part B of this argument; see also Roseman and Copley v. United States, 364 F. 2d 18, 21 (C. A. 9, 1966), cert. denied 386 U. S. 918]. Congress has found in addition that misuse

of these drugs often endangers safety on the highways, without distinction as to interstate and intrastate traffic thereon.

As a last resort, and to prevent frustration of its constitutional power, Congress enacted the Drug Abuse Control Amendments as the only effective way to regulate interstate commerce in drugs of this type which are characterized by an indistinguishable blending of interstate and intrastate activities. Clearly, this is a valid exercise of Congressional power, wholly consonant with the great judicial rulings in constitutional law.

Much of appellant's brief consists of a discussion of cases dealing with narcotics. But those cases are not relevant here since Congress chose a different regulatory pattern in enacting the Drug Abuse Control Amendments. The narcotic laws create rebuttable presumptions regarding interstate commerce. The Amendments in question dispense with any showing of interstate commerce in an individual case.

Appellant's brief suggests that these Amendments are an initial step toward Federal preemption (pages 13-14). This is entirely incorrect. Section 10 of the Amendments unequivocally declares a Congessional intent to the contrary:

> "(b) No provision of this Act nor any amendment made by it shall be construed as indicating an intent on the part of Congress to occupy the field in which such provision or amendment operates to the exclusion of any State law on the same subject matter, unless there is a direct and positive conflict

between such provision or amendment and such State law so that the two cannot be reconciled or consistently stand together.

"(c) No amendment made by this Act shall be construed to prevent the enforcement in the Courts of any State of any statute of such State prescribing any criminal penalty for any act made criminal by any such amendment."

[Quoted in 21 U. S. C. A. in the Notes following Section 321, page 73, of the 1966 Cumulative Annual Pocket Part].

Congress in fact contemplated that the States would have an increasing role in the control of this problem. See Senate Report 337, U. S. Code Congressional and Administrative News, 1965, page 1904.

CONCLUSION

We submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.
WILLIAM J. GARGARO, JR.